

Miscellaneous Papers and letters
concerning

National Phonograph Co.))	In Equity
versus)	
)	
Elmer Fletcher)	

(Note: Includes decision of June 9, 1902.)

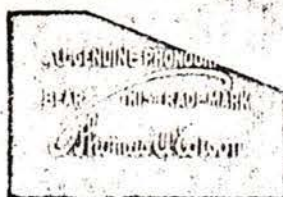
EDISON
PHONOGRAPHS
RECORDS
SUPPLIES

EDISON
STEREO-PROJECTING
KINETOSCOPE
AND FILMS

BATTERIES
FAN MOTORS
BATES NUMBERING STAMPS

WHOLESALE

EDISON



RETAIL

151 FIFTH AVENUE
CORNER TWENTY-FIRST STREET
NEW YORK

H. C. DOUGLAS

Telephone 1616 18th

SANKEY RECORDS
—
CORTINA'S
RECORDS FOR THE STUDY
OF LANGUAGE
—
ORIGINAL RECORDS
—
IMPROVED SPEAKERS
—
POLYPHONES
—
BETTINI REPRODUCERS
BETTINI RECORDS
—
RECORDS TO ORDER

REMOVED TO
10 WEST 22ND ST.

Apr 3 1901.

My Dear Mr. Gilmore -

Referring to the letter recd from Mr. Dyer
Edmunds & Dyer. Re. Speakers. Records. -
We have quite a number of Fletcherized Speakers
on hand. and also a number of Speakers
ready to be Fletcherized. and would like to
finish these up. and also dispose of them.
Would also like to ask whether any
arrangement could be entered into with
Nat Phon Co to ^{make} use of the Fletcher Improvements. -
We know that this Improvmt has helped the
sale of both machines and records. - and
induced people to again use their Phonograph
who had stopped using them because they
were not getting satisfactory results. - It is a
good thing. and has certainly helped rather
than hurt the business of the Nat Phon Co. -
Would be glad to hear direct from you fully regard
the matter. Yours very truly H. C. Douglas

118 Putnam Ave-
Brooklyn
NY.

April 10 1901

Mr W. E. Gilmore
Orange N.J.
Dear Sir

RECEIVED

APR. 11. 1901

Ans'd

If agreeable to
you, I would be pleased
to have you appoint
an interview in regard
to the Fletcher improvement
to the Edison Speaker.

Yours Truly
Chas Fletcher

RECEIVED

APR. 12 1901

Ans'd

Richard A. Dyer;
Samuel C. Edmunds;
Frank L. Dyer;

Law Offices
of
Dyer, Edmunds & Dyer
Specialty: Patents, & Patent Causes.
31 Nassau Street,

Cable Address
"Immer, New York"
Tel. No 2910 Cort.

New York, October 9, 1901.

W. E. Gilmore, Esq.,
National Phonograph Company,
Orange, N.J.

Dear Sir:-

We return herewith the letters of Fletcher and Douglas which we requested you to send us by our letter of the 7th instant. We have made copies of the letters.

Yours very truly,

JRT/EM.
Enclosures.

Wm. C. Edmunds

Richard A. Dyer
Samuel C. Edwards
Frank L. Dyer

Dyer, Edmunds & Dyer
Specialty: Patents, & Patent Counsel.
31 Nassau Street.

Cable Address
"Edwards, New York"
Tel. No. 2910 Cort.

New York, June 10, 1902.

W. E. Gilmore, Esq.,
President, National Phonograph Co.,
Orange, N. J.

Dear Mr. Gilmore:-

I enclose a copy of Judge Thomas' decision in the Fletcher case. Before entering the order for the decree, I hope to have the benefit of a discussion of the situation with you.

Yours very truly,

Rich. A. Dyer

RND/IM.
Encl.

ducers used in the Edison phonograph. The defendant's circulars requested owners to send their Edison reproducers, and promised to return them so improved that they would better perform their functions. The evidence does not show that the reproducers received by the defendant needed repair, although it is inferable that they had been used. Of fifteen hundred changed, nearly all came from one or two dealers in phonographs and parts thereof. A few were received from individual sources. Hence the defendant did not buy, nor sell, reproducers in the usual way,

UNITED STATES CIRCUIT COURT,
Eastern District of New York.

----- x
National Phonograph Co. :
: :
: :
vs. : June 9, 1902.
: :
Elmer Fletcher. :
: :
----- x

Dyer, Edmonds & Dyer, solicitors for complainant.
Seabury C. Mastick, solicitor for defendant.

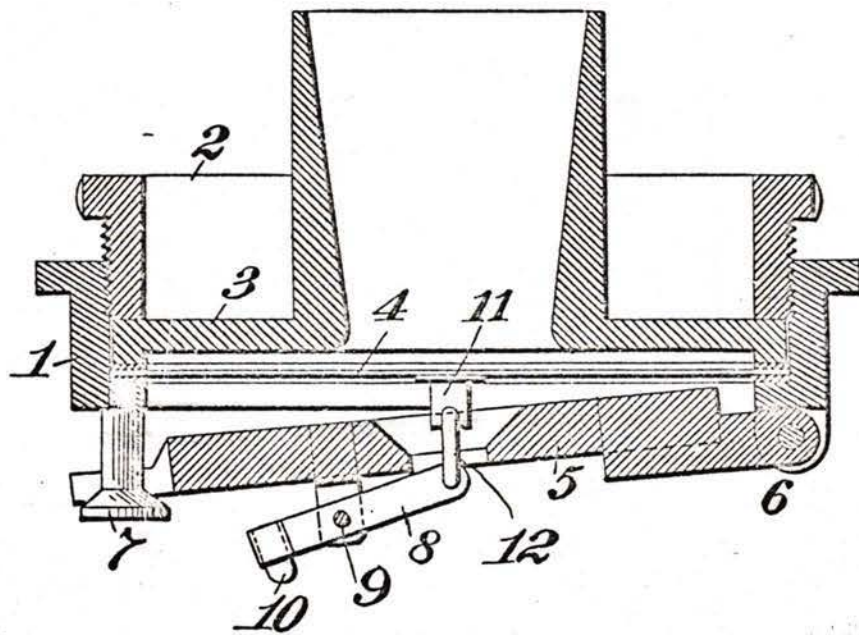
THOMAS, J.

The complainant owns three patents covering reproducers used in the Edison phonograph. The defendant by circulars requested owners to send their Edison reproducers, and promised to return them so improved that they would better perform their functions. The evidence does not show that the reproducers received by the defendant needed repair, although it is inferable that they had been used. Of fifteen hundred changed, nearly all came from one or two dealers in phonographs and parts thereof. A few were received from individual sources. Hence the defendant did not buy, nor sell, reproducers in the usual way,

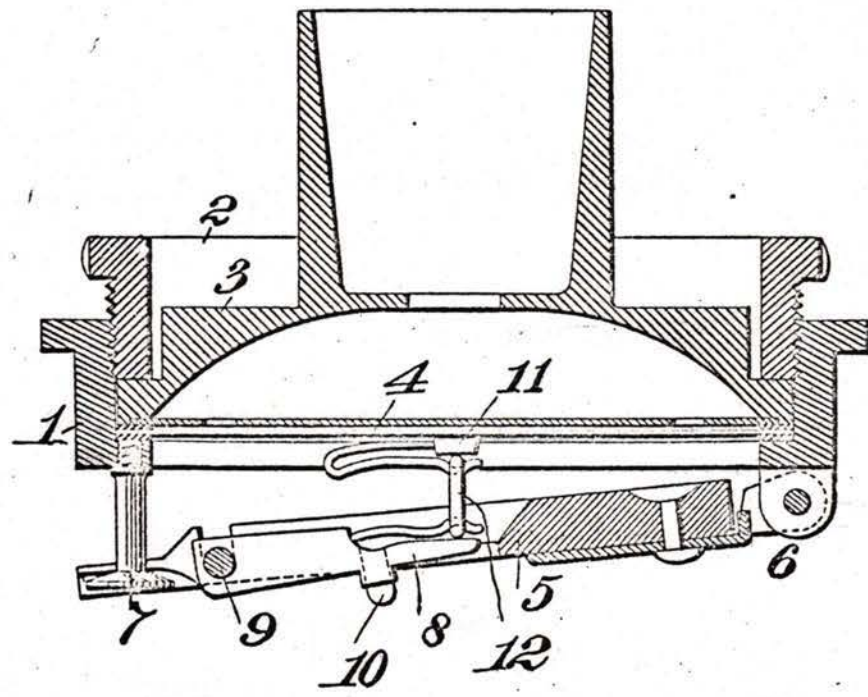
but for the purpose of their alleged nicer operation added labor and material to those owned by others, and for this he was paid. There is no direct evidence that the reproducers refashioned by defendant thereby received increased life or strength. Every reproducer was sold primarily by the complainant; each purchaser paid the complainant a proper tribute. There is no direct evidence that the defendant's traffic has to this time diminished the complainant's sales in number or amount. What then did the defendant? He added his improvement wherever owners of reproducers would permit him so to, and, save in a few instances, returned them to dealers. What did he customarily do in the way of changing the reproducer?

The complainant's and defendant's reproducers are shown in the following figures:

Edison Reproducer



Fletcher Reproducer



The parts in detail are as follows:

1. The body ring
2. The clamping or screw ring.
3. The tube plate.
4. The diaphragm.
5. The weight.
6. The weight hinge.
7. The limiting screw.
8. The sapphire arm.
9. The arm pivot.
10. The sapphire.
11. The cross-head.
12. The link.

Of these the only parts covered by any of the combination claims are, (4) the diaphragm, (5) the weight, (6) the weight hinge, (7) the limiting screw for holding the weight in place, (8) the sapphire arm, (9) the arm pivot, (10) the sapphire, (11) the cross-head, (12) the link. The last five constitute the reproducing point and means for connecting the same to the diaphragm so as to permit independent and lateral movement of the reproducing point. Some of these parts are not specifically stated in the claims but are described in the specification or illustrated diagrammatically.

Patent No. 397,280 covers a combination of the parts above stated, but all the parts fall under the general classification of, a diaphragm, a weight or retarding device, the hinge connection between the weight and the rim

of the frame, a reproducing point, and means for connecting the reproducing point with the diaphragm so as to permit independent and lateral movement of the reproducing point.

Patent No. 430,278 is thus described in the letters:

"This invention relates to the recording and reproducing points of the phonograph, and has for its objects such an improvement in the form and construction of such devices and in the manner of arranging and supporting the same as, in the first place, to materially improve the character of the sounds produced by the instrument, so as to make them more accurately reproduce the sound-vibrations communicated to the recorder than has heretofore been found possible; secondly, to make the instrument of a less delicate character and more readily manipulated and adjusted by inexperienced persons, and, thirdly, to enable the recording-point to be used for a longer period of time without having to be sharpened or reground or replaced by another".

No. 9 of these claims provides for the combination of a recording or reproducing point having a shank or extension, and a sleeve for holding the same; No. 11, for a reproducing point whose bearing surface is the surface of a portion of a sphere; No. 12, for a spherical reproducing point; No. 15, for a reproducing point pivoted so as to have a lateral movement, in connection with a weight bearing thereon; No. 16, for a reproducing point having a bearing surface which is the surface of a portion of a sphere and pivoted so as to have a lateral movement, in

combination with a weight bearing thereon; No. 17, the same as No. 16, without mention of the weight; No. 18, for a laterally-rocking spherical reproducing point, in combination with a weight bearing thereon; No. 20, for the combination of the reproducing point, the lever carrying the same, and connected with the diaphragm, the hinged plate, and the hinge connection between the said lever and said plate; No. 22, for a recording point having a cylindrical head provided with a cutting edge and a shank or extension; No. 23, for the combination of a diaphragm, a lever connected therewith, a sleeve carried by said lever, and a recording or reproducing point removably held in said sleeve.

Counsel for defendant states, after citing Patent No. 430,273,

"It therefore appears that the ball-shaped or spherical reproducing point is the essential part or element of the device set forth in Patent No. 430,273, the secondary elements or parts being the means of mounting the point on the lever and the means of supporting the lever, so that it has a slight movement laterally of the record. That this conclusion is correct is readily shown by a perusal of the patent and by the statement of the inventor (p. 1, line 9): 'This invention relates to the recording and reproducing points of the phonograph'".

Patent No. 434,584 provides for improvement in phonograph-reproducers, as follows: Claim 1, the combina-

tion, in a phonograph, with a phonograph-blank of wax-like material, of a jewel reproducer; Claim 2, the combination with a phonogram-blank, of a rounded jewel reproducer; Claim 3, for a reproducer or bearing-point for phonographs, consisting of a jewel not affected by chemicals or chemical action of the wax-like material of the phonogram blank.

This patent does not seem to be infringed as the part was in every instance supplied primarily by the complainant.

With such survey of the parts of the several patents the defendant's changes in the same may be considered.

(4) Diaphragm -- The diaphragm proper is retained but its associated tube-plate is changed. The Edison tube-plate (not an element in the patented combination) is flat, and is close to the glass with a large opening at the center, while Fletcher's tube is made with a space or sound chamber at the bottom of the central opening, where is placed a plate or resonator with openings at the outer edge, which improves the volume and tone of sounds, as defendant claims. Such plate is inscribed, "The Fletcher, Pat. Applied For".

(5) The weight -- The original plate is retained,

except in twenty-five instances, where recorders from the Edison phonograph were substituted, as shown in Fletcher's Reproducer No. 1. The weight has a slot for a different kind of lever or arm for carrying the sapphire point, and also is given a larger bushing to engage the head of the limiting screw so as to permit of greater movement, and is attached by a hinge essentially different.

(6) The weight hinge -- obviously is of a different type and has, as claimed, a better action.

(7) The limiting screw -- is renewed, and in its bushing permits greater movement of the weight.

(8) Sapphire arm -- discarded and another substituted. The defendant testified, "I place in this slot (in the weight) my sapphire arm, which has a double-pointed pin running through one end of it, these points are held in position by the bushings which are placed in the groove".

(9) Arm pivot -- Edison's discarded and another substituted.

(10) The sapphire -- retained and placed in the substituted sapphire arm.

(11) The cross-head -- Edison's discarded and Fletcher's substituted.

(12) The link -- Fletcher's link substituted.

From this it appears that the only parts retained are, the diaphragm, the weight, and the sapphire point; that the diaphragm is associated with a tube-plate different in form, that the weight is held by a different hinge and limiting screw, and has a different bushing and slot; that the other parts of the combination are all substituted and made from new material and after different designs, but in every case within some of the patents.

From the foregoing it is observed that there is no occasion for repairs, and hence the law relating to that subject has no specific application. The defendant receives reproducers, usually from dealers, for the purpose of returning them with his improvements. Therefore, the question is whether a person may receive reproducers, needing no repairs, place his improvement thereon, and return, (1) with a substitution, change, or change of relation, of every part, (2) with a specifically patented part of the combination reproduced and readjusted.

As to the renewal of the patented parts there is no doubt of infringement, in view of the decisions. *Davis Electrical Works v. Edison Electric Light Co.*, 60 Fed. Rep. 276; *Aiken v. Manchester Print Works*, 2 Cliff. 435.

In *Morgan Envelope Co. v. Albany Paper Co.*, 152 U.S. 433, it was stated with reference to the manufacture and sale of a single element of a combination, with intent that it should be united to the other elements, so as to complete the combination, "Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee". This rule has been recognized even in cases where infringement has not been decreed. *Wilson v. Simpson*, 9 How. 123.

This phase of the case requires no further discussion; hence, the first finding is that the defendant, by creating anew the reproducing point and means for connecting it with the diaphragm, violates Patent No. 430,276. No effort was made by the defendant to show that any particular claim alleged to be infringed was not, but the general contention was that no part of the patent was infringed. All the claims pointed out seem to be infringed, and it will be so adjudged.

The final inquiry relates to the infringement of Patent No. 397,260, which covers the combination of parts. The modification, substitution, and change of relation of parts, passes the limit of allowable repairs. Reproduction

not restoration is intended, for there is no occasion for restoration. Every vital part, except the sapphire, diaphragm and weight, are renewed, but the weight is the same only in its material; the sapphire is reset in an entirely new arm, whose detailed parts are unlike the original, and the diaphragm is associated with a tube-plate quite dissimilar to that of Edison. If the defense were the right to repair, it could not be maintained, for no one acquainted with the appearance of the Edison Reproducer could easily discover it in Fletcher's Reproducer. Viewed superficially or critically recognition is confused, if it does not absolutely fail.

The reproducer is a delicate instrument, adapted to the successful operation of a novel machine. The inventor has received the privilege of selling and having his machine used. The defendant's broad claim is that he may take these reproducers with all their parts, and refashion or reassociate the parts, so that his creation and that of Edison are blended, and concert with dealers for their sale as Edison's genuine device. That is, the defendant claims the right to gather up all of the complainant's output, recast the same, subtract what he will, add his own parts good or bad, and put afloat again as the patented product,

simply because he uses some of the original parts, each in itself unchanged.

If patented machines may be refashioned to suit every skilled or unskilled improver, and marketed as originals with "Fletcher's Improvement", the inventor is at the disadvantage of having numberless coadjutors, whose association he does not invite, and whose improvement may mar the action, merit, or fame of the original device. The improver obtains the benefit of the patent without returning, it may be, equal benefit, and the inventor's goods are on the market in any and every form, good and bad. The whole suggestion seems vicious and unconscionable.

There is nothing in the law relating to repairs, as stated in *Goodyear Shoe Machinery Co. v. Jackson*, 112 Fed. Rep. 146, *Thomson-Houston Electric Co. v. Kelsey Electric Co.*, 75 Fed. Rep. 1005, and kindred cases, that justifies such use of the patented article. It is true that in *Chaffee v. Boston Belting Co.*, 22 How. 217-223, the court states that a purchaser "may repair it or improve it, as he pleases, in the same manner as if dealing with property of any other kind". This decision goes no further than this, that an individual owner may do what he

will with a patented machine or article which is his property. If it be a patent medicine, he may combine it with other substance, and use it thus improved for his own peculiar purposes. The experiment is at his own peril. But if he advertise it for sale after such dilution, as the inventor's medicine with improvements, or turn it over to jobbers for sale, he may be destroying the merit of a patented article and substituting something of his own compounding. What a man may do for his own use with property made pursuant to a patent, is not what he may do for the purpose of selling as another's patented article. Hence, it is considered that the defendant's traffic involves placing Edison's reproducers on the market, hampered with alleged improvements, which may discredit Edison's invention and thereby injure complainant's business, which improvements conceal or obliterate the identity of the original reproducer. In their physical being and fashioning of parts, the Edison reproducers are not "Fletcherized" reproducers, as the defendant terms them when improved, and the complainant is entitled to a decree protecting it from a reproduction of its patented articles under the peculiar and harmful conditions stated.

Richard A. Dyer;
Samuel C. Edmunds;
Frank L. Dyer;

Law Offices
Dyer, Edmunds & Dyer
Specialty: Patents, &c. Patent Causes.
34 Nassau Street,
New York.

Cable Address
"Inverness, New York"
Tel. No. 2910 West

June 27, 1902.

W. H. Gilmore, Esq.,
President, National Phonograph Co.,
Orange, N. J.

6/30/1902

Dear Sir:-

Judge Thomas has signed the decree in the Fletcher case, and we are now in position to use his opinion. The only correction he made in his opinion was to omit claims 11, 12 and 22 of patent No. 430,278 from the finding of infringement. If you will let me know what use you wish to make of the opinion, I shall be glad to aid you in putting the matter into shape. I will at once send the letter to Mobley's counsel, enclosing a copy of Judge Thomas' opinion, which letter you instructed me several days ago to send.

Yours very truly,

Rich. A. Dyer

RND/IM.

*Richard A. Dyer;
Samuel C. Edmunds;
Frank L. Dyer;*

*Law Offices
of
Dyer, Edmunds & Dyer
Specially: Patents, & Patent Causes.
31 Nassau Street.*

*Cable Address
"Tenneco, New York"
Tel. No. 2910 Cor.*

New York, June 24, 1902.

W. E. Gilmore, Esq.,
President, National Phonograph Co.,
Orange, N.J.

Dear Mr. Gilmore:-

In regard to the case against Fletcher, Judge Thomas has the papers and I am daily expecting a memorandum from him correcting his opinion. Since that should be received certainly by the end of the week, I suggest that no announcement be made until it is received. I will inform you at once when I hear from the Judge.

Yours very truly,

Richard A. Dyer.

RND/IM.

Richard A. Dyer,
Samuel P. Edmunds,
Frank L. Dyer.

Law Offices
Dyer, Edmunds & Dyer
Specialty: Patents, & Patent Causes.
34 Nassau Street,

Legal

Cable Address
Leimerv, New York
Fl. No. 2910 Cor.

New York

June 27, 1902.

W. E. Gilmore, Esq.,
President, National Phonograph Co.,
Orange, N. J.

6/30/1902

Dear Sir:-

Judge Thomas has signed the decree in the Fletcher case, and we are now in position to use his opinion. The only correction he made in his opinion was to omit claims 11, 12 and 22 of patent No. 430,278 from the finding of infringement. If you will let me know what use you wish to make of the opinion, I shall be glad to aid you in putting the matter into shape. I will at once send the letter to Mobley's counsel, enclosing a copy of Judge Thomas' opinion, which letter you instructed me several days ago to send.

Yours very truly,

Rich A. Dyer

RND/IM.

ADDRESS REPLY TO THIS COMMUNICATION TO ORANGE, N. J.

NATIONAL PHONOGRAPH CO.

EDISON LABORATORY, ORANGE, N. J.

OFFICE AND SALESROOM.

IN REPLYING TO THIS LETTER

~~1078~~
83 CHAMBERS STREET, NEW YORK.

CHICAGO OFFICE, 144 WABASH AVENUE,
FOREIGN DEPT., 88 CHAMBERS ST., N. Y.

PLEASE MENTION THESE INITIALS.

Orange, N. J.

Oct. 7, 1902.

C. H. Wilson, Esq.,
New York.

Dear Sir:

Referring to the attached letter from Richard M. Dyer, can you give me any information regarding Fletcher? If you do not know personally, possibly Douglas can give you the information, but it is not wise to let Douglas know what you want to do with it.

Regarding the Mobley matter, I do not think that Mobley is doing anything in Philadelphia; however, if you can ascertain anything about it I wish you would do so, even though you have one of our salesmen run down to look the ground over to see what, if anything, he is doing.

Kindly return this letter with your reply.

Yours very truly,

W. E. Gilmore
President.

WEG/IWM

Enc-F

Holds for my file
CHW
1078

C

C. H. W.

Oct. 8, 1902

Douglas & Company,
10 West 22d St.,
New York City.

Dear Sirs;--

Can you give me any information as to the whereabouts of Fletcher, who at onetime and perhaps still manufactures or changes over the Edison Reproducer into the so-called Fletcher Reproducer? If I remember correctly, after you discontinued handling his Reproducer, he went to Matthews of Brooklyn, and one or two other jobbers, and tried to induce them to handle it, but of late I have heard nothing of him. Would like, for my own information, to know whether or not he is, at this time, doing anything in the way of changing over Reproducers. Also his present address, if it can be secured.

Any information you can give me will be fully appreciated.

Yours very truly,

H.W./

MANAGER OF SALES

*Last address known 318 Lewis Ave Bklyn
Understands he has gone West to Indiana.*

Law Offices

Richard A. Dyer
Samuel C. Edmunds
Frank L. Dyer

Dyer, Edmunds & Dyer
Specially: Patents and Patent Causes
31 Nassau Street

Cable Address
"Vermore, New York"
Tel. No. 2910 Cort.

New York, October 14, 1902.

W. E. Gilmore, Esq.,
President, National Phonograph Company,
Orange, N. J.



Dear Mr. Gilmore:-

Yours of 13th instant received. I note your information about Fletcher and your instructions in the Mobley matter. Regarding the possibility of getting anything out of Fletcher, his attorney informed us some time ago that he had had nothing from Fletcher and had been running the case without charge as a personal favor to another client from whom he had a considerable amount of business. He also told us that so far as he knew Fletcher had nothing out of which we could satisfy any judgment.

Yours very truly,

Rich A. Dyer

RND/IM.